The Minister for Finance has passed the Transfer Pricing Regulations, 2020 (L.I. 2412) ("the Regulations") to administer transfer pricing and its related matters in Ghana. L.I. 2412 has replaced the Transfer Pricing Regulations, 2012 (L.I. 2188).

It worthy to note that, the Regulations have adopted some provisions of the OECD’s Base Erosion and Profit Shifting (BEPS) Action Plans, specifically, Action Plans 4, 8, 9, 10 and 13.

Additionally, certain safe harbor rules have been introduced to simplify the documentation requirements of selected related party transactions.

Key Developments

We have listed some of the key developments in the new TP Regulations.

1. Controlled Transactions

L.I. 2412 has categorized certain related party transactions as not consistent with the arm’s length principle based on the benefit test.

These transactions include:

- Shareholder services including:
  - shareholder meetings
  - the issue of shares
  - stock exchange listings of the parent company
  - cost of supervisory board of the parent entity

- Services rendered in relation to reporting requirements such as:
  - the consolidation of reports and group financial statements
  - the audit of the subsidiary carried out exclusively in the interest of the parent company

- Services performed in relation to raising funds for the acquisition of participation and investor relations of the parent company except where this participation is directly or indirectly acquired by the Ghanaian resident taxpayer and benefits or is expected to benefit the taxpayer

Duplicated services except where the duplication of service is only temporary and needed to achieve a reasonable business objective or undertaken to reduce the risk of taking a wrong business decision
2. Value Creation of Intangible Assets

The L.I. 2412 has introduced an additional requirement in assessing the arm's length nature of charges and fees for the use of intangible assets.

This requirement is in line with **BEPS Action 8 – 10 Transfer Pricing, Implementation Guidance on Hard-to-Value Intangibles**. It has incorporated principles surrounding Development, Enhancement, Maintenance, Protection and Exploitation (DEMPE) analysis. This is to help determine the arm's length nature of related party-controlled arrangements, involving the use of intangible properties.

This requirement is to help address issues surrounding the allocation of monetary benefits to Ghanaian resident entities that enhance the value of brands, via, its maintenance and exploitation.

3. Cost Contribution Arrangements (CCAs)

Regulation 8 of L.I. 2412 requires the Commissioner-General (C-G) of the Ghana Revenue Authority (GRA) to consider the following conditions in determining the arm's length price for CCAs:

- The contractual arrangement
- The assets contributed by each participant
- Risks assumed by each participant
- The management and control of these risks
- The financial capacity to assume the risk

This Regulation is expected to eliminate ambiguities that have surrounded the transfer pricing compliance of CCAs.

4. Financing Arrangements

The Regulations have detailed instances where the C-G may adjust interest on inter-company loans or loan fees to reflect the amount an independent person, in a comparable circumstance, would have charged for providing the loan or credit facility.

This includes:

- where there is no interest or loan fees charged on the loan
- where interest is not charged on trade payables or any other credit facility which remains unpaid for twelve months

where interest or loan fees charged is not consistent with the arm’s length standard
5. Business Restructuring

Regulation 10 requires the C-G to consider a business restructuring arrangement between persons in a controlled relationship [per Part IV of the Income Tax Act, 2015 (Act 896)], to have satisfied the arm's length principle, if the amount received for the transfer of functions, rights, interests, assets and risks among persons in a controlled relationship reflects the amount an independent person in comparable circumstances would pay for the transfer of those functions.

6. Safe Harbor Rules

The Regulations has introduced safe harbor rules that exempt related party transactions from maintaining contemporaneous transfer pricing documentation, specifically, a local transfer pricing report and a master file if they meet the requirements as listed below:

- **Transactions less than Ghana Cedis equivalent of USD 200,000**

  The Regulations exempts taxpayers who enter a transaction with a related party for a monetary value of less than USD 200,000.

- **Low Value Adding Services**

  A related party transaction can be classified as a low value adding service so far as the charge does not exceed USD 200,000 using actual cost plus mark-up of 3%.

  In determining this threshold the C-G may aggregate two or more arrangements where he is satisfied that the arrangements are in furtherance of tax avoidance.

  Services that do not qualify as low value adding services include:

  - Services that constitute the core business of the persons in the controlled relationship
  - Research and development services
  - Manufacturing and production activities sales,
  - Marketing and distribution activities insurance
  - And reinsurance

  It should be noted that, taxpayers who satisfy the conditions for low value adding services specified in the Regulations may, by a notice to the C-G, elect to be exempted from using the actual cost plus mark-up method within 30 days of entering the arrangement.

- **Technology Transfer Agreement (TTA)**

  Taxpayers who enter into a TTA with related parties may elect in writing to be exempted from maintaining a contemporaneous transfer pricing documentation where the TTA is registered with the Ghana Investment Promotion Centre (GIPC) and the amount charged in respect of the transaction complies with the safe harbor rules.
This notice of election must be done within 30 days of entering into the agreement. The taxpayer is bound by this arrangement for a period of 3 years unless otherwise determined by the C-G in writing.

Below are the acceptable ranges:

<table>
<thead>
<tr>
<th>Transaction</th>
<th>Range</th>
</tr>
</thead>
<tbody>
<tr>
<td>Royalties</td>
<td>Not exceeding 2% of net profit</td>
</tr>
<tr>
<td>Know-How</td>
<td>Not exceeding 2% of net profit</td>
</tr>
<tr>
<td>Management or Technical Fees</td>
<td>Not exceeding 2% of net profit</td>
</tr>
</tbody>
</table>

Net Profit is defined as earnings after interest, tax, depreciation and amortisation excluding the charge for the technology transfer.

7. Required Documentation

Taxpayers with related party transactions are required to maintain the following documentation and are required to file them with the GRA, by the stipulated period:

- Annual Transfer Pricing returns four (4) months after financial year end
- Country by Country Reports (CbCR) twelve (12) months after financial year end

Contemporaneous documentation which includes:
  - Local file
  - Master file

Taxpayers are to file the contemporaneous documentation electronically. However, the mode of electronic filing or portal as stated is yet to be clarified by the C-G.

Note that the CbCR is to be filed by ultimate parent entities or constituent entities of a multinational enterprise (MNE) resident in Ghana for tax purposes.

This, however, does not apply to MNE groups with an annual consolidated revenue of less than GH¢2.9 billion, equivalent to approximately USD510 million today, reported in the consolidated financial statements with respect to the fiscal year that immediately precedes the reporting year.
8. Filing of Transfer Pricing Documents

Furthermore, these required listed reports are required to be filed with the GRA by the following dates:

<table>
<thead>
<tr>
<th>Documentation</th>
<th>Due Date for Filing</th>
</tr>
</thead>
<tbody>
<tr>
<td>Annual Transfer Pricing return</td>
<td>Four (4) months after each financial year end</td>
</tr>
<tr>
<td>Country by Country reports (CbCR)</td>
<td>Twelve (12) months after each financial year end</td>
</tr>
<tr>
<td>Local file</td>
<td>Four (4) months after each financial year end</td>
</tr>
<tr>
<td>Master file</td>
<td>Four (4) months after each financial year end</td>
</tr>
</tbody>
</table>

9. Penalties & Interests

The following penalties and interests apply where taxpayers do not comply with transfer pricing requirements:

<table>
<thead>
<tr>
<th>Offence</th>
<th>Penalty/Interest</th>
</tr>
</thead>
<tbody>
<tr>
<td>Failure to maintain documentation</td>
<td>Where the failure is deliberate, penalty of 75% of the tax attributable to that period determined by the C-G and in any other case, the lesser of the amount referred above and 250 currency points for each month or part of a month during which the failure continues</td>
</tr>
<tr>
<td>Failure to file annual transfer pricing return</td>
<td>Penalty of GH¢500 and a further GH¢10 for each day that the default continues</td>
</tr>
<tr>
<td>Underpayment of tax</td>
<td>An interest of 125% of the Bank of Ghana statutory rate compounded monthly applied on the outstanding tax liability</td>
</tr>
</tbody>
</table>

10. Operational Date of the Regulations

The Regulations have been gazetted by the Minister for Finance on 10 August 2020 without an indication of the date of entry into force. In the absence of the date of entry into force, the Regulations became effective from the gazette date being 10 August 2020. has not been stated.

However, there is an ongoing discussion amongst key stakeholders on the date of entry into force of the Regulations and KPMG will communicate as soon as the GRA issues a directive on this.